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**Congress of the United States**  
**Washington, DC 20515**

DEC 13 2011  
15:07

**BEFORE THE**  
**SURFACE TRANSPORTATION BOARD**

Docket No. FD 35087 (SUB-NO. 8)

**CANADIAN NATIONAL RAILWAY COMPANY**  
**AND GRAND TRUNK CORPORATION**  
**—CONTROL—**  
**EJ&E WEST COMPANY**

**ENTERED**  
**Office of Proceedings**

**DEC 13 2011**

**Part of**  
**Public Record**

**COMMENTS IN SUPPORT OF**  
**PETITION SEEKING IMPOSITION OF ADDITIONAL MITIGATION**  
**PURSUANT TO BOARD'S OVERSIGHT JURISDICTION AND**  
**REOPENING PURSUANT TO GOVERNING REGULATIONS**  
**FILED BY**  
**VILLAGE OF BARRINGTON, IL**

On behalf of the residents and communities who are being adversely impacted by the Canadian National's acquisition of the Elgin, Joliet and Eastern Railroad, we strongly urge the Surface Transportation Board to exercise its oversight jurisdiction and fully consider the new evidence and allegations of material error that the Village of Barrington has brought to its attention in its October 14 petition. In seeking additional mitigation pursuant to the Board's oversight jurisdiction, it appears that Barrington has presented new evidence to support its position that it is entitled to the same type of grade separation mitigation that was granted to Aurora and Lynwood.<sup>1</sup>

In defending the Board's earlier decision denying Barrington grade-separation mitigation before the United States Court of Appeals, Board's counsel echoed the Board's 2008 conclusion that "the record did not support a separation there, as the total delay time would increase by only

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<sup>1</sup> See, "Comparison of CN Railway Crossings of U.S. Route 14 in Barrington and U.S. Route 34 in Aurora", Barrington Petition at 13.

4%-5% during peak periods.”<sup>2</sup> That conclusion was initially provided by the Board as justification that a grade separation “would not be practical or warranted at those crossings.” Decision No. 16 at 45.

In seeking additional mitigation, Barrington relies on a 2011 VISSIM traffic study prepared by Civiltech Engineering, Inc. In its 2011 traffic study, which is based on CN’s current operations through both Barrington and Aurora,<sup>3</sup> Civiltech has concluded that fundamental, material error occurred when the Board’s contractor, HDR, used a unique and discriminatory analysis methodology to compute total delay time in Barrington – a methodology that was not used for any other community located on the EJ&E line. Because Barrington during the course of the initial proceeding could not have reasonably anticipated that the Board would analyze Barrington impacts in a manner not applied to all other communities,<sup>4</sup> or that Barrington should engage in multiple comparative VISSIM analyses of other communities prior to the Board’s determination to require grade-separation mitigation at particular crossings, it appears that the comparative 2011 VISSIM studies performed by Civiltech fit within the definition of “new” evidence. Because there is a clear public interest in demonstrating that the actions of federal regulators are not discriminatory, we believe that it is imperative that the Board look closely at the evidence raised in the Barrington petition and either confirm or refute it with analytical specificity.

As the third largest metropolitan area in the country, it is essential that regional commuter transportation efficiencies be maintained in the greater Chicagoland area. Because U.S. Route

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<sup>2</sup> Joint Brief of Respondents at 65, citing the Board’s December 24, 2008 Decision No. 16 at 45 and footnote 101.

<sup>3</sup> Aurora was one of the two communities in Illinois that were awarded mitigation in the form of grade separations.

<sup>4</sup> Not only was “peak period” VISSIM analysis that HDR employed to measure the increase in total delay time in the Barrington area not used for any other community, but it ignored the cumulative impact of increased train traffic through the remainder of the day.

14 is a primary Strategic Regional Arterial (“SRA”) serving the northwest portion of the greater Chicago region and will be the only U.S. highway crossing the CN/EJ&E rail line that would lack a grade separation once the acquisition’s currently ordered mitigation conditions are completed, we cannot help but question the Board’s 2008 failure to focus on the regional aspects and impact of the transaction on this significant SRA.

Given that federal funds have already been expended in undertaking the initial engineering work for the underpass at U.S. Route 14, we believe that it is timely and appropriate to shift any further financial responsibility for this grade separation to CN, which is an unquestioned beneficiary of the deal that the STB approved. Absent that, there is no avoiding the conclusion that taxpayers will be forced to bear the cost of mitigating the harms that result from CN’s expanded rail operations through Barrington.

Any claim that CN relied on the finality of the Board’s decision and would not have closed on the transaction had it believed that it would be responsible for the cost of a crossing at Barrington should be rejected as disingenuous. First, CN closed the deal on January 2009 and did not wait for the Court of Appeals to decide the merits of its own challenge that the STB’s mitigation requirements were “unwarranted and unlawful” and that the STB had “no authority to impose this environmental condition over the objection of [CN].” Second, CN closed without waiting to see whether the Court would grant Barrington’s appeal. Third, any such claim must be viewed in light of CN’s pre-acquisition request that the Board allow it to acquire control of the EJ&E before the environmental process was completed with the idea that the Board would still be able to impose any lawful environmental mitigation that it might determine is required.

Fourth, CN chose to close with full awareness that the Board reserved jurisdiction to impose additional conditions and take other action if, and to the extent, the Board determines it is

necessary to address matters related to operations or environmental mitigation. As Commissioner Mulvey explained in his Comments attached to Decision No. 19, served August 5, 2009, the purpose of the five-year oversight period is to allow the Board “to account for certain potential negative outcomes that may be worse than those estimated in the EIS.” As he also noted, “the Board has the necessary tools to monitor this transaction in the coming years ... [and] the Board should consider possible new and enhanced mitigation at the appropriate time.” We submit that the increased delay that will be experienced in Barrington as a direct result of the approved transaction appears to be far greater than the 4-5% increase in total time delay that was the cited basis for the Board’s decision that a grade separation in Barrington would not be practical or warranted.

In order to protect its ability to award new and enhanced mitigation – a possibility that was explained to the public in approving this transaction -- the Board should firmly reject any interpretation of Condition 72 that would restrict its ability to do so. If the Board were to accept CN’s claim that administrative finality would prevent the award of new and enhanced mitigation during the oversight period, it would completely gut the Board’s rationale for reserving oversight of this transaction.

We stress that CN’s position that Barrington’s petition be dismissed without consideration of its merits raises concern about the future of other commitments and agreements CN has made in this proceeding. This concern is not baseless given CN’s overall record. We remind the Board that even before the acquisition had received federal approval CN’s then-CEO testified to a congressional committee that the Board had full authority to condition approval with mitigation mandates when it was attempting to derail legislation to clarify that point. Post-acquisition, CN flipped on the issue and contested the Board’s authority to order mitigation that

CN opposed. Furthermore, the Board has been forced to levy a fine against the railroad due to CN's deceptive reporting on the number of times its freight trains blocked crossings on the EJ&E. Given this history, the Board should consider the new evidence regarding the disparate treatment afforded Barrington with an open mind and reject any suggestion that it should not take a fresh look in order to correct any material error that Civiltech's 2011 Traffic Study has revealed.

We further urge the Board to consider requiring CN to pay the full cost of constructing the grade separation at U.S. Route 14. As Barrington has determined, CN's recent implementation of Constant Warning Time (CWT) has added to traffic delays and queue lengths at both the Strategic Regional Arterial routes in Barrington. However, Barrington has sought relief for only one of them even though it appears that it could well justify seeking relief for both. Given that concession, it is only fair to require CN, as the beneficiary of the Board's approval of its acquisition of the EJ&E line, to pay the full cost of mitigation associated with the construction of a grade separation at U.S. Route 14 rather than the taxpayers of Illinois who are already on the hook for a high percentage of the cost of constructing grade separations in Aurora and Lynwood, Illinois.


Sincerely,



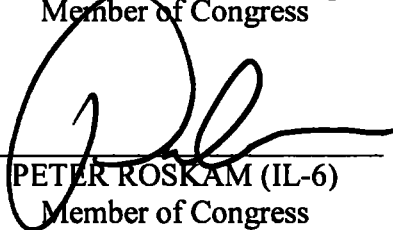
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